Supreme Court, U.S.
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No. 95-1983

In The

Supreme Court of the United States

October Term, 1995

MARK MCWILLIAMS,

Petitioner,

v.

FAIRFAX COUNTY BOARD
OF SUPERVISORS,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly upheld the District Court's grant of summary judgment to the employer when the employee failed to present evidence that the employer knew or should have known of the alleged harassment.

2. Whether the Court of Appeals correctly upheld the District Court's grant of summary judgment to the employer when the employee failed to present evidence which showed that the claimed harassment was because of the employee's gender.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Fairfax County Board of Supervisors, by counsel, respectfully asks the Court to deny the petition for writ of *certiorari* of the petitioner, Mark McWilliams.

COUNTERSTATEMENT OF THE CASE

A. Procedural History.

The petitioner, Mark McWilliams, an employee of the Fairfax County Equipment Management and Transportation Agency ("EMTA"), filed suit on October 13, 1993, in the United States District Court for the Eastern District of Virginia ("District Court") against the Board of Supervisors of Fairfax County, Virginia ("County"); Lee Cash ("Cash"), McWilliams' first-line supervisor during 1991-92; and Miguel Boschulte ("Boschulte"), his first-line supervisor during 1987-91 at the EMTA facility at Newington ("Newington") where he worked; and a number of his coworkers, Carl Helmandollar, Trevor Pinnock, Elmer Powell, David Puckett, James Riddle, Charles Shelton, and Douglas Witsman ("coworker defendants").[1]

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[1] The coworker defendants were represented by separate counsel before the District Court. They have consistently denied McWilliams' allegations. *See, e.g.*, Appendix Volume IV at pages 1277, 1347, 1350-1351 and 1353, and Shelton Dep. Tr. at 30-31. (References to the Appendix are to the Appendix in McWilliams' appeal to the U.S. Court of Appeals for the Fourth Circuit. Hereinafter references to this Appendix will be to "App. (Volume Number) at (page number))." McWilliams did not

McWilliams' amended complaint alleged thirteen separate counts against the various defendants. Count VII alleged a Title VII claim against the County for sex discrimination.[2] The County denied liability and asserted

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appeal the dismissal without prejudice of his state claims against these defendants and subsequently dismissed his federal claims against them from his appeal to the Fourth Circuit.

Subsequently, McWilliams filed suit against the coworker defendants, with the exception of Powell, in the Fairfax County Circuit Court ("Circuit Court"), At Law No. 132548. Initially, McWilliams also named Cash and Boschulte as defendants in this suit, although McWilliams later nonsuited them (voluntarily dismissed them without prejudice) after the Circuit Court had granted their motion for a bill of particulars (more definite statement). In this suit, McWilliams alleged conspiracy against all of the coworker defendants; assault against Pinnock, Shelton, Riddle and Witsman; battery against Pinnock, Shelton, Riddle, and Witsman; false imprisonment against Pinnock, Shelton, Riddle and Witsman; and intentional infliction of emotional distress against all of the coworker defendants. On September 14, 1995, the jury returned verdicts in favor of the defendants on all of McWilliams' claims except assault and battery against Witsman alone and intentional infliction against all of the coworker defendants and fixed his damages at $24,000. The Circuit Court entered judgment on the verdict after denying McWilliams' and the coworker defendants' post-trial motions. The Virginia Supreme Court denied the coworker defendants' petition for appeal on April 15, 1996.

[2] Counts I, II, IV and V alleged claims pursuant to 42 U.S.C. § 1983 for violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment based upon claims of sex and disability discrimination against the County. Cash and Boschulte were sued pursuant to 42 U.S.C. § 1983 for violation of the Equal Protection Clause based upon a claim of sex discrimination in Count III and of disability discrimination in Count VI. The District Court granted summary judgment on

various affirmative defenses in its answer. After the parties had completed discovery and had filed their trial exhibits with the District Court in accordance with its amended scheduling order, the County filed its motion for summary judgment on April 1, 1994. After the parties had briefed the motion, the District Court heard oral argument on April 22, 1994, and granted summary judgment for the County.[3]

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these claims to the County, Cash and Boschulte, which the Fourth Circuit affirmed. In his petition, McWilliams does not ask this Court to review the Court of Appeals' affirmance of the District Court's grant of summary judgment to the County, Cash, and Boschulte on his various Section 1983 claims. McWilliams abandoned his claim against the Board under the Americans with Disabilities Act (Count VIII) in the District Court. Counts IX-XIII set forth various state law claims against Cash and Boschulte and the coworker defendants. For the subsequent disposition of these claims, see discussion *infra* at n.1.

[3] In granting summary judgment to the County, Cash and Boschulte on McWilliams' Section 1983 and Title VII claims, the District Court found that there was no actual or constructive notice to the County, Cash, or Boschulte of the harassment later claimed by McWilliams. April 22, 1994, Transcript at 36-38; *see also McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191, 1194 (4th Cir. 1996). In its opinion, the Fourth Circuit noted "The County raises serious questions as to whether McWilliams has proffered sufficient admissible evidence to support the necessary finding that any of his supervisors, hence the County, were on actual or constructive notice of coworkers' conduct sufficient to have created a hostile workplace environment." 72 F.3d 1191 at 1195. The Fourth Circuit went on to decide the Title VII claim on the issue of harassment by coworkers of the same gender. However, in affirming summary judgment on the Section 1983 claims against the County, Cash and Boschulte, the Fourth Circuit found that "McWilliams'

McWilliams appealed the District Court's grant of summary judgment to the U.S. Court of Appeals for the Fourth Circuit. In a published opinion, a panel of the Fourth Circuit affirmed the District Court's grant of summary judgment. The Fourth Circuit denied McWilliams' petition for rehearing and suggestion for rehearing *en banc* on March 12, 1996. McWilliams' petition for a writ of *certiorari* followed.

B. Statement of Facts.

McWilliams' "Statement of the Case" in his petition omitted many of the material facts bearing on the issues in this case. For example, McWilliams failed to inform the Court that, by his own admission, he did not tell any supervisory personnel about the alleged acts of battery and sexual abuse by his coworkers until long after he had left the workplace. Because of this and other omissions, and being mindful of the Court's admonition in Rule 15.2 of the Rules of the United States Supreme Court, the County submits its own Statement of Fact.

McWilliams was hired as an Automotive Mechanic I in June 1987. Throughout his employment with EMTA, he worked at Newington. His first supervisor was Art

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proffer of evidence here failed on the threshold requirement that Cash or Boschulte knew or had any reason to know of the specific incidents of physical assault (as opposed to teasing and 'horseplay')" and "[t]here simply was no proffered evidence in the summary judgment record of any pattern, known or unknown to the County, of pervasive conduct by its employees of the type that allegedly befell McWilliams." 72 F.3rd 1191, 1197 and 1198. *See also* discussion *infra* at 6-12.

Lowry. Boschulte was his supervisor from approximately September 1987 through November 1991.[4] Cash was his supervisor from November 1991 through September 1992.[5]

McWilliams went out on sick leave in early September 1992. He was hospitalized from September 22 to October 9, 1992, and again from October 29 to November 20, 1992. Since September 21, 1992, he has never returned to work. After McWilliams had exhausted his accumulated earned leave, the County extended him extraordinary sick leave through March 1993.[6] From March 1993 until March 1994, he was carried by the County in a leave without pay status. Effective March 10, 1994, McWilliams was separated from County employment as a result of a reduction in force ("RIF") affecting EMTA due to the privatization of another EMTA facility.[7]

At all times during this period, the County was willing to return McWilliams to a paid status and offered several options to him for doing so.[8] McWilliams, however, citing medical advice, chose not to do so. As part of the RIF, McWilliams had the opportunity to take another County position or to take a position with the private

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[4] *See* App. IV at 1224-1225.

[5] App. IV at 1225 and 1232.

[6] App. IV at 1364-1365.

[7] *See* App. IV at 1411-1424. Several of the coworker defendants were also separated as a result of the RIF.

[8] App. IV at 1364-1365.

contractor. However, he elected to be separated and to take severance pay.[9]

Prior to making a complaint to EMTA management on October 12, 1992, McWilliams, by his own admission, never told anyone at EMTA or in County government about any of the acts he later alleged were committed by his coworkers, with two minor and isolated exceptions.[10] In the spring or summer of 1991, Boschulte noticed that McWilliams was acting sick and asked him what was wrong. McWilliams told Boschulte that someone had put a condom in his pastry. Boschulte was not present when McWilliams bit into the doughnut.[11] At that time, the Newington Superintendent, Sid Pullman, investigated the incident. Within a few days, a meeting was held with all employees in the section to make sure that there would not be a repetition of the incident.[12]

On July 22, 1992, McWilliams told Cash that Witsman had been teasing him about "girls and other things."[13] McWilliams was initially reluctant to say who had been teasing him and what the teasing was about. However,

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[9] App. IV at 1422-1423.

[10] App. I at 236 (79), 239 (91), 245 (114-115), 251 (133-134), 254-255 (146-148), 257 (156-158), 259-260 (167-168), 261 (173-174), 263 (181), 267 (196-198), 268-69 (201-206), 270 (210), 273 (220-222), 274 (224), 278-279 (240-244), 279-281 (247-255), 282 (258), 283 (261-262), 312-313 (376-380).

[11] Boschulte did not recall the incident. App. IV at 1226. However, he did not dispute that he knew about it at the time.

[12] App. I at 222-225 (24-34) and 295-296 (311-314).

[13] App. IV at 1233 and 1276.

Cash persisted and McWilliams told him.[14] Cash told McWilliams he would talk to Witsman.[15] Witsman told Cash he may have said something that McWilliams may have taken the wrong way and offered to apologize, stay away from him, or whatever Cash thought best.[16] Cash told him not to do it again.[17] Cash told McWilliams what he had done and told him to let him know if there were any further problems.[18]

Later, in August 1992, when Cash observed that McWilliams was in "bad shape" and asked him what was the matter, McWilliams told him he was upset because of his parents' divorce.[19] Cash referred McWilliams to the County's Employee Assistance Program because he was

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[14] *Id.*; App. I at 241-242 (96-100).

[15] App. I at 241-242 (98-100); App. IV at 1233-1234.

[16] App. IV at 1234-1236, 1256 and 1350.

[17] App. IV at 1235, 1256, 1276 and 1282-1284.

[18] App. I at 241 (97-99); App. IV at 1237 and 1348. McWilliams suggested in his brief in the Fourth Circuit that he had spoken to Cash on two other occasions about "harassment" by his coworkers. *See, e.g.*, McWilliams' Brief at 10-11, 15, and 19. According to his deposition, McWilliams spoke to Cash once in July and then again at the end of July. *But see* App. II at 519-520 (McWilliams' notes). Both Cash and McWilliams' depositions made it clear that Cash had to prod McWilliams to get any details and the name of who was allegedly harassing him, the matter complained about was Witsman's teasing of McWilliams, and that the only time McWilliams complained to Cash was in July of 1992. App. I at 241-242 (99-100); *see also* App. IV at 1275-76, 1278 and 1299.

[19] App. I at 308 (362); App. IV at 1282, 1284 and 1348.

concerned about him.[20] Cash had a meeting with the other workers and told them not to tease McWilliams.[21] According to McWilliams, the teasing stopped immediately.[22]

According to McWilliams, neither Cash nor Boschulte was ever present during any of the incidents of harassment complained about by McWilliams. According to McWilliams, neither Cash nor Boschulte had any knowledge concerning any of the alleged "harassment" except for what McWilliams told them.[23] McWilliams admitted that he never told either Cash or Boschulte about any of the incidents he later complained about except for the pastry incident and Witsman's teasing of him.[24] According to McWilliams, the other employees always acted "innocent" whenever the supervisors were present.[25] McWilliams admits that he has no firsthand knowledge about what Cash or Boschulte knew about the incidents other than the two instances where he made a complaint.[26]

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[20] App. I at 233-234 (65-69) and 283-284 (263-264); *see also* App. IV at 1283 and 1348.

[21] App. IV at 1283, 1278, 1296 and 1299.

[22] App. IV at 1278, 1296 and 1299.

[23] App. I at 372-375; App. IV at 1228-1230 and 1238.

[24] App. I at 236 (79), 239 (91), 245 (114-115), 251 (133-134), 254-255 (146-148), 257 (156-158), 259-260 (167-168), 261 (173-174), 263 (181), 267 (196-198), 268-69 (201-206), 270 (210), 273 (220-222), 274 (224), 278-279 (240-244), 279-281 (247-255), 282 (258), 283 (261-262), 312-313 (376-380) and 372-375; App. IV at 1227-1230, 1238 and 1349.

[25] App. I at 262 (177).

[26] App. IV at 1449. In his brief to the Fourth Circuit, McWilliams represented that he had told *Billie* Davis, a night

According to McWilliams, while he worked at EMTA, he socialized with his coworkers in their off-hours,

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foreman, that his coworkers were harassing him. He also asserted that Billie Davis was told by the Superintendent, Buck George, to "mind his own business" when Billie Davis told him about it. McWilliams' Brief at 9; *see also* McWilliams' Brief at 22 and 23. The Court should not be misled into believing that the deposition testimony cited in support of those representations is either that of McWilliams or *Billie* Davis. The cited testimony, App. III at 1163-1164, is that of *Hannon* Davis, another of McWilliams' coworkers. However, this "evidence" did not meet the requirements of Fed. R. Civ. P. 56(e) because Hannon Davis, by his own testimony, had no personal knowledge of either conversation. App. III at 1164-1165. Further, Hannon Davis' testimony made it clear that the Billie Davis-Buck George conversation took place (if at all) after Cash had sent McWilliams for treatment through the Employee Assistance Program in August 1992. App. III at 1163-1164; *see also* App. IV at 1288. Hence, George's comment, "mind your own business, none of your concern, we will handle it." Hannon Davis admitted that he never told any foreman that anyone was "messing with Mark." App. III at 1166.

McWilliams also referred to a meeting held by Frank Knapp to suggest that Knapp had some knowledge of McWilliams' complaints concerning his coworkers *prior* to his leaving the work place. McWilliams' Brief at 9; *see also* McWilliams' Brief at 22. Knapp was George's replacement as Superintendent of Newington. George retired in 1993. *See* App. IV at 1346. Knapp's comments, as reported by Hannon Davis, did not refer to any complaints arising *before* McWilliams left the work place but were directed at rumors and accusations which had arisen *during and after* the subsequent Equity Programs, Police, and EEOC investigations which commenced after McWilliams had left the work place in the fall of 1992 and ended in early 1993. App. III at 1154-1155

In his brief to the Fourth Circuit, McWilliams described a lurid work environment at EMTA. *See* McWilliams' Brief at 9-10. However, nowhere did he cite to any evidentiary material,

attending parties, watching football games in each

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including his own deposition, to suggest that he was in any way offended by the alleged choices of radio programs, magazines, jokes, or cartoons or that he had complained about any of these matters until long after he had left the workplace. In fact, McWilliams admitted that he had kept a collection of the allegedly offensive cartoons at home. Despite the fact that he had this collection, he did not disclose it to the Equity Program, Police, or EEOC investigators nor did he bring it up with the psychologists and psychiatrists with whom he had been treating. App. I at 268-274 (201-224); 276-283 (232-263); 287-288 (279-280).

McWilliams also claimed that Mike Stutzman, another supervisor, had warned Cash about the so-called "lube boys" and their harassment of McWilliams. McWilliams' Brief at 14-15 and 21-22. The evidentiary materials cited by McWilliams in support of this "fact" do not meet the Rule 56(e) standard. Under Fed. R. Civ. P. 56(e), supporting affidavits must be based upon personal knowledge, must set forth facts which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated therein.

McWilliams' own deposition testimony did not demonstrate that Stutzman had any firsthand knowledge of the matters which he allegedly reported to Cash. App. I at 263-264 (182-184). Further, McWilliams' deposition concerning this alleged conversation made it clear that he was simply reporting what he said Hannon Davis had told him that Stutzman had told him (Davis). However, according to Davis in his deposition, the alleged conversation did not concern McWilliams directly and was directed toward problems generally in the "old section." App. III at 1138-1140. Davis stated that Stutzman had told him that he (Stutzman) had not seen anything. App. III at 1139. Both McWilliams' and Davis' testimony is hearsay not subject to any exception. F.R.E. 802. Neither McWilliams nor Davis has any personal knowledge that the alleged conversation even happened. F.R.E. 602. In any event, even the hearsay did not disclose that Cash was told about anything that would give any kind of notice of the harassment alleged by McWilliams.

other's homes, and going on fishing trips.[27] McWilliams also admitted that he had engaged in "horseplay" in the workplace with his coworkers.[28]

During the summer of 1992, McWilliams' coworkers noted that he appeared to be upset. When asked by others what was the matter, McWilliams said that he was very upset about his parents' divorce, that he was upset that his relationship with Kathy Hall had not worked out, and that he was worried about being transferred or separated as a result of projected privatization of and reductions in force at EMTA.[29] In August 1992, when Cash asked him what was bothering him, McWilliams told him he was upset because of his parents' divorce.[30]

At all times relevant to this lawsuit, the County clearly prohibited discrimination against employees, such as McWilliams, on the basis of *inter alia*, sex and/or

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[27] App. I at 255-256 (148-155), 294-295 (307-310), 299 (326-327), 307-308 (359-362); App. IV at 1227, 1244, 1253, 1257, 1350-1352, 1354 and 1357.

[28] App. I at 257 (157-159), 275 (228), 317 (396-398); App. IV at 1285.

[29] App. I at 234 (68-69), 308-309 (362-364, 366-367); App. IV at 1241, 1250-1251, 1283-1284, 1287, 1297, 1348, 1352, 1356 and 1357. In April or May 1992, McWilliams' parents began divorce proceedings. App. I at 233-234 (67-68) and 302 (339). In the summer of 1992, he dated a school bus driver, Kathy Hall, on several occasions. App. I at 303-307 (343-359).

[30] App. I at 308 (362); App. IV 1283-1284, 1287 and 1348. In his deposition, McWilliams did not deny that when he was asked about what was bothering him he told people that he was concerned about these matters. However, he contended that in fact he was upset because of the alleged harassment.

disability, and provided for various mechanisms for identifying, investigating and resolving employee complaints of discrimination.[31] The County's Office of Equity Programs ("Equity Programs") is and was specifically charged with investigating employee claims of discrimination.[32] In addition, employees may pursue grievances concerning such allegations to a final and binding decision under the County's state-mandated grievance procedure.[33]

There was no evidence of any history of complaints of discrimination on the basis of sex, male, or disability on the part of the County.[34]

McWilliams first advised EMTA management that he was making a claim of sexual harassment on October 12, 1992.[35] On October 13, 1992, the Newington Superintendent, Earl George, at the direction of Miriam Hudgins, the EMTA Personnel Officer, investigated McWilliams' complaint, which was initially directed at Witsman and Pinnock, and took statements from them on October 13, 1992, and later took a statement from Cash on October 22,

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[31] Pers. Reg. § 1.8 (App. IV at 1382); App. IV at 1369-1370; *see also* Fairfax County Code §§ 3-1-1 and 3-1-11 and the Fairfax County Grievance Procedure (App. IV at 1377-1381 and 1392-1408).

[32] App. IV at 1369-1370; *see also* App. IV at 1409-1410.

[33] App. IV at 1392-1408.

[34] *See* App. IV at 1371.

[35] *See* App. IV at 1281.

1992.[36] McWilliams subsequently submitted a workers' compensation claim on October 19, 1992.[37]

On October 23, 1992, McWilliams, at the suggestion of the Employee Relations Division of the County's Office of Personnel, came to Equity Programs to file a complaint. He was interviewed on November 6, 1992.[38] Equity Programs conducted interviews of 18 employees as part of its investigation during November and December 1992, and January 1993. Equity Programs completed its final investigative report on February 3, 1993.[39] This investigation uncovered no eyewitnesses to the acts of physical touching claimed by McWilliams.

During the course of that investigation, rumors of a possible criminal act surfaced. A second investigation was conducted in January and February of 1993 by Investigator Robert Murphy of the County Police Department. During the course of that investigation, McWilliams made and then retracted allegations of unwelcome physical touchings by several coworkers. The investigation uncovered no criminal acts.[40] Following these two investigations, disciplinary action was taken against several employees.[41]

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[36] App. II at 518; and App. IV at 1255, 1274 and 1276; *see also* App. IV at 1281 and 1366-1368.

[37] App. IV at 1275.

[38] App. IV at 1259-1273 and 1277-1279.

[39] *See generally* App. II at 472-482 and App. IV at 1366-1370.

[40] *See generally* App. 1430-1445; *see also* App. IV at 1291-1299 and 1368.

[41] Both before the District Court and the Fourth Circuit, McWilliams argued that the County did not have a policy

McWilliams filed his charge of discrimination with the U.S. E.E.O.C. on January 7, 1993.[42]

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prohibiting the type of conduct he complained about because at the time, the County did not have a policy prohibiting "sexual harassment." The record on summary judgment demonstrated that this was a somewhat disingenuous semantical argument. As was addressed in detail in the County's response to McWilliams' Interrogatory Number 5 (McWilliams' Tr. Ex. 135): "Conduct which constitutes harassment of a sexual nature or on the basis of disability violates the County's Standards of Conduct, subjecting the violators to disciplinary action ranging from written reprimands to dismissal." App. IV at 1369-1370. In its answer, the County specifically referred to Chapter 16 of the County Personnel Regulations which was also provided in response to McWilliams' request for production of documents. App. IV at 1383-1391.

The Standards of Conduct in Chapter 16 specifically required employees to "exercise courtesy and tact in dealing with fellow employees." App. IV at 1389. Further, they specifically prohibited "engaging in criminal, dishonest, immoral or disgraceful conduct prejudicial to the County" and "threatening or assaulting a fellow employee." App. IV at 1389, 1390. Any conduct which can be characterized as "sexual harassment" is proscribed by the Standards of Conduct. *See, e.g.*, App. IV at 1239; *see also* App. IV at 1427.

In fact, McWilliams' own trial exhibits demonstrated that conduct amounting to sexual harassment was punishable under the Standards of Conduct at the times relevant to his complaint. *See, e.g.*, App. II at 479 and App. IV at 1301-1314. The fact that after the investigations of McWilliams' allegations the County adopted a policy specifically dealing with sexual harassment cannot as a matter of law "foster a finding that the County had an insufficient and ineffective sexual harassment policy prior to McWilliams' complaints" as urged by McWilliams. McWilliams' Brief at 25. F.R.E. 407.

[42] App. IV at 1447.

REASONS FOR DENYING PETITION

The Court should deny the petition because the judgment of the Fourth Circuit, affirming the District Court's grant of summary judgment to the County on McWilliams' Title VII claim, is plainly correct. Even if this Court were to decide that the two questions presented by McWilliams in his petition should be answered in the negative, the County would still be entitled to summary judgment because of McWilliams' failure of proof on two of the elements of his Title VII claim. None of the cases cited by McWilliams in his petition stand for the proposition that an employer is liable for hostile environment sexual harassment by coworkers, absent a showing that the employer knew of, or should have known of the harassment, and had failed to take prompt and reasonably effective remedial action once it had knowledge. None of the cases cited by McWilliams in his petition support the proposition that a Title VII plaintiff does not have the burden of proving that the alleged discrimination was because of his or her sex.

The real issue presented by the facts of this case is not whether a person who alleges that he or she has been physically and mentally assaulted by harassment of a sexual nature by his or her coworkers should have a cause of action against the alleged perpetrators for damages.[43] Nor is the issue really as simple as the global

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[43] Such offensive conduct creates a number of causes of actions for a variety of common law torts. In this case, McWilliams has asserted such actions, proven some of them and failed to prove others and has received damages in accordance with his proof.

question whether Section 703 of Title VII of the Civil Rights Act of 1964 ("Title VII") permits an action for sex discrimination based upon same-sex sexual harassment.[44] The real issue presented by this case is whether a plaintiff may defeat his or her employer's motion for summary judgment on his or her claim of sex discrimination under Title VII based upon harassment with sexual connotations by his or her coworkers when the record on summary judgment discloses that there is no evidence from which a reasonable jury could find that the employer knew or should have known of the harassment, yet failed to take prompt and reasonable remedial action or that the alleged discrimination was because of the plaintiff's sex.

I. The Court of Appeals Correctly Upheld The District Court's Grant Of Summary Judgment Because The Record On Summary Judgment Failed To Demonstrate That There Was A Triable Issue Of Fact On Whether The County Knew Or Should Have Known Of The Alleged Harassment

Even if the harassment alleged by McWilliams had constituted discrimination against him on the basis of his sex, male, the record on summary judgment showed that McWilliams could not satisfy a critical element of a Title VII claim: i.e., that the County knew or should have known of the harassment and had failed to take prompt

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[44] The Fourth Circuit specifically reserved ruling on the general question whether, when all of the actors involved in a Title VII claim of sex discrimination (in any of its forms) are of the same sex, the homosexuality of any may make the claim nevertheless cognizable as one of "discrimination because of [the victim's] sex." *McWilliams*, 72 F.3d 1191 at 1195 n.4.

and remedial action. *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48 (6th Cir. 1996); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995); *Collins v. Baptist Memorial Geriatric Ctr.*, 937 F.2d 190, 193 (5th Cir. 1991), *cert. denied*, 502 U.S.1072 (1992).

There is no question that when McWilliams made his complaint on October 12, 1993, of serious misconduct on the part of his coworkers, the County took prompt and effective remedial action by immediately and thoroughly investigating the factual basis of his complaint, by taking disciplinary action in those instances where it was warranted, and by providing McWilliams extensive sick leave and the opportunity to return to active employment with the County. McWilliams' claim is that in some unspecified manner, the County should have known what McWilliams claimed was going on before he made his complaint on October 12, 1992, and taken some action despite the fact that he had not told any supervisor about the alleged harassment. McWilliams' claim must fail because based upon McWilliams' own deposition testimony, there was no way that the County could have known about the alleged misconduct before he made his complaint on October 12, 1992.

According to McWilliams, his coworkers *only* harassed him when supervisory personnel were not around. In other words, the only persons who knew about the alleged misconduct at the time when it occurred were the alleged victim, McWilliams, and the alleged perpetrators. Under these circumstances, only the alleged victim would have had any incentive to make the alleged misconduct known to supervisory personnel. However, according to McWilliams, with two minor

exceptions,[45] he did not tell any supervisory personnel about any of the acts he later claimed were harassment until after he had left the workplace in September 1992.

Not only did McWilliams not tell any supervisory personnel about what he now claims was in fact happening to him, when he was asked by such personnel and other coworkers what was bothering him, according to McWilliams, he "lied" and attributed his upset to other concerns, such as his parents' divorce, the failure of a romantic relationship, and his concerns about being laid off. McWilliams' "lie" was credible because in fact his parents were getting divorced, he had a failed romantic relationship, and his foreboding about a reduction in force was shared by everyone else. Based upon McWilliams' own account, the only way the County could have discovered the acts which McWilliams later complained about earlier than his complaint of October 12, 1992, was for McWilliams to have told someone. With the exception of two minor complaints discussed above, McWilliams did not do so until long after the fact and after he had left the workplace. When McWilliams did make a complaint, the County and its supervisory

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[45] The two minor exceptions were the pastry incident in 1991 and Witsman's teasing of McWilliams in July 1992. In both cases, supervisory personnel took what appeared to be, based on what McWilliams was willing to say at the time, prompt and effective remedial action. These two isolated and separated instances by themselves cannot by themselves amount to the severe and pervasive harassment sufficient to alter the conditions of McWilliams' employment, as required by this Court in *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993).

employees took appropriate action considering the available information. The fact that the County took prompt and reasonably effective remedial action upon learning of McWilliams' complaints, protects it from liability under Title VII. *Spicer v. Commonwealth of Virginia*, 66 F.3d 705, 709-711 (4th Cir. 1995) (*en banc*); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428 (7th Cir. 1995); *Garcia v. Elf Atochem d/b/a Ozark Mahoning & Co.*, 28 F.3d 446, 451 (5th Cir. 1994); *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 193 n.4 (1st Cir. 1990); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 558 (4th Cir. 1987); *Ryczek v. Guest Serv. Inc.*, 877 F. Supp. 754 (D.D.C. 1995).

II. The Court Of Appeals Correctly Affirmed The District Court's Grant Of Summary Judgment Because The Record On Summary Judgment Failed To Demonstrate That There Was A Triable Issue Of Fact On Whether The Alleged Harassment Was Because of McWilliams' Gender

Title VII prohibits discrimination on the basis of the plaintiff's sex. In this context, "sex" does not refer to the act of sex or sexual orientation or preference, but to the employee's gender, i.e., the employee is either a man or a woman. Title VII by its own words and in its interpretation by the courts does not purport to protect employees from any and all possible unpleasantness in the workplace. Title VII protects individuals from discrimination based upon the individual's membership in a protected class, such as his or her race, creed, national origin, or sex. As noted by this Court, "Without question, when a supervisor sexually harasses a subordinate *because of the subordinate's sex*, that supervisor 'discriminate[s]' on the

basis of sex. . . . Sexual harassment which creates a hostile or offensive environment for *members of one sex* is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 67 (1986) (emphasis added); *see also Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) (discriminatory conduct because of their gender). The record on summary judgment was void of any evidence that McWilliams was the victim of the alleged harassment of his coworkers because he was a male.

The case law cited and discussed by McWilliams on the issue of same-gender sexual harassment ranges the gamut of those cases holding that such a claim can never be actionable under Title VII, *see, e.g., Garcia v. Elf Atochem d/b/a Ozark Mahoning & Co.*, 28 F.3d 446, 451 (5th Cir. 1994) and *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988),[46] to those cases which, at least under certain circumstances, would allow such a claim, *see, e.g., Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995). The Fourth Circuit in this case and *Hopkins v. Baltimore Gas and Electric Co.*, 77 F.3d 745 (4th Cir. 1996), has not, like the Fifth Circuit in *Garcia*, categorically foreclosed a same gender sexual harassment action under

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[46] Some of the cases following *Garcia* and/or *Goluszek* and holding that same sex sexual harassment is never actionable are: *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996); *Wrightson v. Pizza Hut of America, Inc.*, 909 F. Supp. 367 (W.D. N.C. 1995); *Mayo v. Kiwest Corp.*, 898 F. Supp. 335 (E. D. Va. 1995); *Ashworth v. Roundup Co.*, 897 F. Supp. 489 (W. D. Wa. 1995); *Benekritis v. Johnson*, 882 F. Supp. 521 (D. S.C. 1995); and *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995).

Title VII; however, it does require proof that the harassment is because of the employee's gender. *McWilliams*, 72 F.3d 1191, 1195-1196; *Hopkins*, 77 F.3d 745, 748-753.

In reviewing the authorities cited by McWilliams, it is significant that many of the cases which held that a plaintiff made out a same-gender sexual harassment claim under Title VII were cases of *quid pro quo* sexual harassment by a supervisor. *See, e.g., Raney v. District of Columbia*, 892 F. Supp. 283 (D.D.C. 1995); *Boyd v. Vonnahmen*, 1995 U.S. Dist. LEXIS 7542, 67 Fair Empl. Prac. Cas. (BNA) 1769, 66 Empl. Prac. Dec. (CCH) ¶ 43,620 (1995) (homosexual supervisor); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995) (homosexual supervisor); *Prescott v. Ind. Life and Accident Ins.Co.*, 878 F. Supp. 1545 (M.D. Ala. 1995) (homosexual supervisor); *Joyner v. AAA Cooper Transp.*, 597 F. Supp. 537 (M.D. Ala. 1983); and *Wright v. Methodist Youth Service, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981) (homosexual supervisor). This type of case is clearly distinguishable on the facts from this case which involves a claim of hostile environment based upon harassment with sexual connotations by co-workers of the same gender.[47] The courts in these cases found that the harassment was because of the employee's sex where a homosexual supervisor made homosexual advances to the plaintiff because they were of the same

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[47] In fact, a number of these cases distinguished *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) on the ground that *Goluszek* involved a claim for hostile environment, rather than, *quid pro quo*, sexual harassment. *See, e.g., Boyd v. Vonnahmen*, 1995 U.S. Dist. LEXIS 7542, 67 Fair Empl. Prac. Cas. (BNA) 1769, 66 Empl. Prac. Dec. (CCH) ¶ 43,620 (1995); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995).

gender, in the same manner that a heterosexual supervisor's sexual advances toward an employee were because the employee was of the opposite sex. Whatever merit this argument has in the context of a *quid pro quo* sexual harassment claim, it has no merit in analyzing hostile environment claims, where, as here, all of the actors involved are of the same gender. If a harasser has the choice of harassing either males or females and exclusively harasses only one gender, it may be inferred that the victim's gender is the basis of the harassment. However, in a case such as this, where the harassers, the victim and all of the other coworkers are of the same gender, there is no basis for inferring that the basis for the harassment was the victim's gender.

As the Fourth Circuit found in this case,

> As a purely semantic matter, we do not believe that in common understanding the kind of shameful heterosexual-male-on-heterosexual-male conduct here (nor comparable female-on-female conduct) is considered to be "because of the [target's] '*sex*.' " Perhaps "because of" the victim's known or believed prudery, or shyness, or other form of vulnerability to sexually focussed speech or conduct. Perhaps "because of" the perpetrators' own sexual perversion, or obsession, or insecurity. Certainly, "because of" their vulgarity and insensitivity and meanness of spirit. But not specifically "because of" the victim's *sex*.

McWilliams, 72 F.3d 1191, 1195-1196 (emphasis added); *see also Hopkins*, 77 F.3d 745, 751-753.

A review of the record on summary judgment considered in light of the totality of the circumstances demonstrates that McWilliams failed to proffer any admissible evidence sufficient to create a triable issue of fact that the harassment he complained of was because he was a male. This failure is fatal to his Title VII claim. *Quick v. Donaldson Co.*, 895 F. Supp. 1288 (S.D. Ia. 1995) (sexual harassment of any kind to be actionable under Title VII must be based on gender discrimination); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 136-138 (S.D. Tex. 1993) (even assuming *arguendo* same-sex sexual harassment is actionable under Title VII, harassment must be because of victim's gender); *Garcia v. Elf Atochem d/b/a Ozark Mahoning & Co.*, 28 F.3d 446 (5th Cir. 1994); *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). According to the plaintiff in *Goluszek*, his male coworkers periodically asked him if he had gotten any "p --y" or had oral sex, showed him pictures of nude women, told him they would get him "f ---ed," accused him of being gay or bisexual, and made other sex-related comments. 697 F. Supp. at 1454. The coworkers also poked him in the buttocks with a stick. *Id.* However, as the court succinctly pointed out:

> Title VII does not make all forms of harassment actionable, nor does it make all forms of verbal harassment with sexual overtones actionable. . . .
>
> During the times relevant to his claim, Goluszek was a male in a male-dominated environment. . . . The argument that Goluszek worked in an environment that treated males as inferior consequently is not supported by the record. In fact, Goluszek may have been harassed "because" he is a male, but that harassment was

> not of a kind that created an anti-male environment in the workplace. A wooden application of the verbal formulations created by the courts would salvage Goluszek's sexual-harassment claim. The court, however, chooses to adopt a reading of Title VII consistent with the underlying concerns of Congress. . . .

Goluszek, 697 F. Supp. at 1456 (citation omitted); *see also Quick v. Donaldson Co., Inc.*, 895 F. Supp. 1288 (absent a basis in gender discrimination no actionable sexual harassment).

In ruling that Goluszek was not the victim of sexual harassment within the meaning of Title VII, the court noted that he was a male in a male-dominated environment and that, therefore, the argument that he worked in an environment that treated males as inferior was not supported by the record. The same rationale applies to the facts of this case. As in *Goluszek*, McWilliams worked in a male-dominated environment. All of the persons whom he alleges "harassed" him were male. The harassment that McWilliams alleges he suffered did not create an anti-male environment in the workplace. *Goluszek*, 697 F. Supp. at 1456. Title VII does not afford protection to individuals who are generally less powerful than other individuals. "Actionable sexual-harassment fosters a sense of degradation in the victims by attacking their *sexuality*." *Goluszek*, 697 F. Supp. at 1456 (emphasis added). Moreover, to recover under Title VII, McWilliams must prove that "but for [his] sex, [he] would not have been the object of harassment." *Goluszek*, 697 F. Supp. at 1456. McWilliams cannot point to any evidence in the record to support the contention that but for his sex, male, he would not have been treated by his coworkers in

the way he claims he was.[48] *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 138 (S.D. Tex. 1993).

McWilliams' Title VII claim fails because he failed to demonstrate that there was a triable issue of fact that the alleged harassment was because of his male sex.[49]

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[48] The facts in *Goluszek* are very similar to the facts in this case. Even those courts permitting a same-gender sexual harassment case to proceed have distinguished *Goluszek* factually. *See, e.g., Ecklund v. Fuisz Technology, Ltd.*, 905 F. Supp. 335 (E.D. Va. 1995) (Goluszek was being harassed about sexually related matters; he was not actually being harassed because he was male).

[49] Neither the District Court nor the Fourth Circuit reached the issue of whether McWilliams had filed a timely Title VII action, although the County raised that defense. McWilliams' Title VII claim is time barred because he did not file a timely charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"). Under Title VII, a plaintiff must file his or her charge of discrimination with the U.S. EEOC within 180 days of the act or acts giving rise to complaint. 42 U.S.C. § 2000e-5(e) (Supp. 1993). McWilliams filed his charge of discrimination on January 7, 1993. Therefore, his Title VII claim could not be based upon any alleged act occurring on or before July 12, 1992. Based upon the record on summary judgment, there can be no argument that the County knew or should have known of any alleged harassment and failed to take appropriate action with respect to any act or complaint of McWilliams after that date. Indeed, the only alleged act of harassment which occurred after that date shown by the record was Witsman teasing McWilliams in July 1992. As discussed *supra*, that complaint was promptly dealt with by Cash.

McWilliams attempted to avoid the statutory bar by claiming that he was entitled to the "continuing violation" exception to the statutes of limitations applicable to his Section 1983 and Title VII claims. *See* App. II at 404-412. This claim is without merit.

III. McWilliams' Title VII Claim Is Moot

In his Title VII claim, McWilliams seeks to hold the County liable in damages for the injuries inflicted upon him in his employment by his coworkers. McWilliams has already litigated his claims against his coworkers in the state courts. McWilliams prevailed on a few of his claims and lost on others. He has already received a final judgment for money damages for the injuries which he proved were caused by his coworkers. The County's liability for damages under Title VII, if any, is derivative of the damages for which the coworkers are liable. McWilliams has already received a judgment for such damages. Therefore, his Title VII claim against the County is moot because he already has a judgment for such damages.

The facts known or which could have been known by the Board were that, until after McWilliams had left the workplace in September 1992, and after he had made his complaint to the Office of Equity Programs in October 1992, the only incidents involving McWilliams and his coworkers were minor and isolated and did not constitute violations of Title VII. As has been noted previously, under McWilliams' own version of events, the only practical way that County supervisory personnel could have found out about the alleged harassment of McWilliams by his coworkers would have been for McWilliams to have told them about it. The evidentiary record in this case can only support a finding that two isolated and unrelated events were communicated to these defendants. *See Delaware State College v. Ricks*, 449 U.S. 250, 256-257 (1980) (limitations periods on Section 1981 and Title VII claims, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protects employers from defending claims arising from employment decisions long past). Through no fault of the County, McWilliams did not promptly assert his rights.

CONCLUSION

This case is not the appropriate case for this Court to determine whether and under what circumstances Section 703(a) of Title VII of the Civil Rights Act of 1964 permits an action for harassment with sexual connotations by coworkers of the same gender. The final result in this case would be the same whether this Court would decide that harassment by coworkers of the same sex which has sexual connotations is always, never, or sometimes actionable under Title VII.

The County was entitled to summary judgment on McWilliams' Title VII claim because McWilliams had failed to raise a triable issue of fact whether the alleged harassment by his coworkers was because of his sex, male, or that the County knew, or should have known, of the harassment and had failed to take prompt and effective remedial action. For the reasons stated above, the Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

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